BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

NO. 2052 of 2008

BETWEEN:

SUZANNE MARGUERITE COSTELLO-HALOUTE **APPLICANT**
(Beneficiary of the Estate of
Albert Anthony Haloute, Deceased)

AND

ELIAS HALOUTE **FIRST RESPONDENT**
(Executor of the Estate of Albert
Anthony Haloute, Deceased)
ASSAD JOHN HALOUTE **SECOND RESPONDENT**
RYAN HALOUTE **THIRD RESPONDENT**
JANINE HALOUTE **FOURTH RESPONDENT**
DOMINIC HALOUTE **FIFTH RESPONDENT**
CHRISTIAN HALOUTE **SIXTH RESPONDENT**
MARIELLA HALOUTE-LINTON **SEVENTH RESPONDENT**
THALOA HALOUTE-KING **EIGHTH RESPONDENT**
ZACK ROBERT NADUR SNR **NINETH RESPONDENT**
ZACK TROY NADUR **TENTH RESPONDENT**

Before the Honourable Mr. Justice William J. Chandler, Judge of the High Court.

2009: June 10; July 13 and 14; September 22 and 23;

Mr. Clive Phelps with Mr. Ian C.A. Bishop for the Applicant
Mr. Barry L.V. Gale, Q.C. with Mrs. Leodean Worrell for the first respondent
Mr. Garth Paterson, Q.C. with Mrs. Esther Arthur for the 2nd to 10th respondents

DECISION

Introduction

[1] The applicant is the widow and one of the beneficiaries of the estate of Albert Anthony Haloute, deceased. The first respondent is the executor of the estate of the said deceased. The second to tenth respondents are beneficiaries under the estate of said deceased. The said Albert Anthony Haloute died on the 3rd day of August 2008 having by his will made on the ninth day of June 2004 appointed the first respondent, his brother, the sole executor thereof.

[2] On the 19th day of December 2008, the applicant filed a notice of motion seeking various orders and more particularly the orders at paragraph 8 and 9 of the said notice of motion which are set out below. On 10 June 2009, the respondents made certain *in limine* submissions in respect of the relief claimed in the said paragraphs

[3] In paragraph 8 of the notice of motion the applicant claimed:

> "An order removing the respondent from being executor of the estate of the deceased (Albert Anthony Haloute)"

Under paragraph 9 the applicant claimed in the alternative:

> "An order that two other persons namely herself and Reginald Austin beneficiaries under the will of the said deceased be appointed as administrators of the estate of the deceased together with the Respondent and that the decisions of the said Executor and Administrator be on the basis of a majority."

The Submissions

[4] Mr. Gale Q.C submitted that the Applicant must satisfy the Court that it has jurisdiction either under the ***Administration of Estates Act*** **Cap 242**, ***the Succession Act*** **Cap 249** or under its inherent jurisdiction as provided for in the headnote to the notice of motion. Counsel argued that the Court had no jurisdiction to remove the Executor named in the will of the deceased or to appoint additional executors. He relied on **Order 80** of the ***Rules of the Supreme Court (RSC)*** **1982** which provides that the Court may exercise control over executors by making orders to protect the beneficiary and to ensure that the estate is administered according to law. Counsel posited further that interference with a testator's last solemn act (in his choice of executor) by the Court is a significant interference with the testator's right (of choice) that requires specific statutory authority or sanction.

[5] He referred to the fact that the United Kingdom (U.K) Parliament passed the ***Judicial Trustee Act*** **1896**, Section 50 of which grants the right or power to appoint an additional or substituted personal representative. He submitted further that no such power is given in the ***Administration of Estates Act*** of the Laws of Barbados.

[6] Counsel further submitted that the ***Administration of Justice Act*** **1985** which gives power to replace a personal representative in the U.K. is not part

of the Laws of Barbados and no similar provision exists in the local law. He further submitted that there is no inherent jurisdiction in the Court to remove a personal representative and that this power was first introduced by the 1896 **Act**.

[7] Reference is also made to Section 43 (4) of the ***Trustee Act*** **Cap 250** of the Laws of Barbados which states that nothing in this section gives power to appoint an executor or administrator. Counsel asked the Court to dismiss the application of the Applicant as it relates to paragraphs 8 & 9 of the relief claimed therein.

[8] Mr. Patterson Q.C in his submissions was supportive of Mr. Gale's position. He added however that it was impossible to appoint administrators in addition to the executor so as to have the two offices running at the same time. Where paragraph 9 was concerned Mr. Patterson Q.C further submitted that the court did not have power to substitute the executor. He submitted that the applicant was seeking to preserve the will of the testator in the person of the first respondent, who is duly invested with the power of an executor and to augment the said will by appointing two other persons as administrators. He submitted, further that this could not be done in law since the offices of executor and administrator could not co-exist in respect of the

same estate. He urged the Court to find that it did not have the requisite power to substitute the executor.

[9] Reference was made to the ***Law of Succession – Parry and Clark*** **11th Edition paragraph 17-01**. Counsel further submitted that the two instances where the court may substitute personal representatives in place of existing personal representatives do not apply since they relate to minority interests and settled land.

[10] He referred to the situation where the court may pass over executors and appoint administrators under Section 116 of the **U.K. *Supreme Court Act,* 1981**, by reason of special circumstances, for example, when one is given a life sentence (***The Estate of S*** **[1968] P 302.**) or where persons are too elderly or infirm (***The Estate of Brigs, deceased,*** **[1966] P 118*).*** It was his submission that the power to add or remove an executor could only be exercised by the Court if expressly granted by Parliament in statute and that the applicant must demonstrate that the Laws of Barbados so permit. He also submitted that the executor could not be removed prior to the grant of probate.

[11] Mr. Phelps for the applicant submitted that the Court had jurisdiction according to the ***Administration of Estates (Jurisdiction and Procedure Act)*** **Cap 242 of the Laws of Barbados**. Section 2 of this **Act** provides that:

> "The High Court of Barbados should have the same powers – in relation to all matters and causes testamentary – which are within the jurisdiction of the High Court as the Probate Division of the High Court of Justice and its grants and orders now have with regard to the same matters in England."

[12] He submitted that the Law of England was incorporated by reference into the Laws of Barbados if one used a purposive approach to statutory interpretation. By virtue of the ***Supreme Court of Judicature Act*** **Cap 117A**, law and equity are administered side by side in the local court. In summary, he submitted that there was power to remove an executor and if that were not so, an executor could rip off an estate and nothing could be done about it.

[13] By virtue of Section 2 of the U.K ***Court of Ordinary Act*** which is incorporated by reference with the ***Administration of Estate (Jurisdiction and Procedure) Act,*** counsel submitted that *Section* 50 of the **U.K. 1985** ***Administration of Justice Act*** was received in the ***Trustee Act*** **1896**.

[14] Mr. Phelps further submitted that the Court had inherent jurisdiction to grant the orders sought; that the jurisdiction of the Court was wide and broad and that it was a growing equitable one. Further, that the court, in exercising its jurisdiction, had to look at the circumstances of this case to determine whether such power ought to be exercised.

[15] One must look, he submitted, to the facts to determine whether the executor named has by his conduct has taken on the character of trustee, that is, whether he was a constructive trustee or a *trustee de son tor*t.

[16] Mr. Gale Q.C in reply, submitted that Section 2 of the ***Administration of Estates (Jurisdiction and Probate) Act*** was not ambulatory and Barbados received only the laws in force in England at the date of passage of that **Act**.

Discussion

[17] For the purposes of this decision, I do not intend to go into the *minutiae* of every point which was raised before me. There is some merit in Mr. Gale's submission that the wording of Section 2 of the ***Administration of Estates (Jurisdiction and Procedure) Act*** may not be ambulatory in the sense that it may refer to the incorporation of the Laws of England into Barbados' law at the date of passage of the local **Act**. That is, that it may not lend itself to an interpretation which gives an open reception of all laws passed in England after the date of coming into force of the local **Act**.

[18] I am not convinced, however, on the authorities submitted to me that the point taken *in limine* ought to be ruled on now.

[19] In this matter, several orders and/or reliefs are sought in the notice of motion; namely:

> (1) a declaration that in the events which have happened, the respondent was or became a

constructive trustee of all monies payable to Albert Haloute or the applicant as receiver of the estate as therein outlined.

(2) An order for a full and proper account of monies received or coming into his hands;

(3) A declaration that the respondent during the period 4th August 2008 to 30th November 2008 was or became the executor of the will of the deceased and was constituted a trustee of all monies payable to the estate as alleged in the prayer for relief;

(4) An order for proper accounting of all sums received by the Respondent or coming into his hands as executor or trustee as moneys had or received by him and payable to the estate or the Applicant principle beneficiary, during the period 4th August 2008 to 3rd November 2008;

(5) A claim for maintenance by the wife;

(6) A claim for a stipulated monthly sum as the Respondent's maintenance;

(7) An injunction to restrain the Respondent whether by himself, his servants and/or agents from acting, or dealing with or purporting to deal with as executor of the estate other than in obedience to any declaration and/or order made in these proceedings.

(11) Such further or other orders or reliefs as the justice of the case may require.

[20] In the applicant's affidavit in support filed 19th December 2008, the applicant alleged that the first respondent had control of companies in which the deceased and others had interests and further that he managed at least

one of them in a manner which was displeasing to the other shareholders and directors.

[21] It was further alleged that the first respondent, during the period of time when the deceased was hospitalised, made arrangements to purchase three properties at a cost of $10 million from Sabah Investment Ltd. of which he was a director; that the purchase price was a gross undervalue and quite significantly, was not negotiated with the other directors of the company including herself, nor was his interest in a contract with the company disclosed at a board meeting. She alleged that it was an arbitrary and unilateral decision on the first respondent's part.

[22] Mrs. Costello-Haloute further alleged a loss of trust, confidence and faith in the first respondent and that only after pressure from the other directors and herself, the first Respondent was forced to countermand his previous decision to purchase the three properties.

[23] Under Paragraph 7 (iii) the applicant further alleged that the deceased ought to have received $50,000.00 in December 2007 but the money was never paid over at the time, however, on 2nd January 2008 in the presence of one Kathy Dyall, he promised to pay her the said $50,000.00 and when she asked for it, the first respondent at first alleged that it had been paid to her, then changed his story and said it had been paid to an employee of the

company, Kathy Dyall. Ms. Dyall, the applicant deposed, denied ever being paid or receiving this money.

[24] Paragraph 7 (iv) alleged that the sum of $240,000 was deposited to an account by the deceased – that one Reginald Austin and the deceased were signatories to the account and that the first respondent requested the said Reginald Austin to draw a cheque in the sum of $240,000.00 to said account payable to the respondent which was done without the respondent's knowledge or consent.

[25] Paragraph 12 alleged that the deceased maintained an account at First Caribbean International Bank in his own name, into which he deposited his own moneys but that the respondent's name was added to the account for convenience during the deceased's illness. The balance stood at $998,743.75 and these funds were secretly withdrawn leaving a balance of $33.27. It is further alleged that the respondent used these funds to pay his own expenses (payments to Barbados Turf Club and Kendall Stables) and shared $65,000 with Zack Nadur.

[26] It is unnecessary to go into all the applicant's allegations with respect to the first respondent's dealings with the estate of the deceased. Suffice it to say that the first respondent has by affidavit given his side of the story, but this

Court has not had the benefit of hearing these deponents either giving evidence in chief or under cross-examination.

[27] I do not believe that justice will be served by ruling on the points raised *in limine* without the benefit of hearing the case in its entirety. This point, *in limine,* is framed in terms of the jurisdiction of the Court but really turns on whether the Court has power to grant the relief sought.

[28] I am therefore of the opinion that it is unwise for me to make any definitive ruling on my power to add or remove the executor without first hearing this case and giving to all sides the opportunity to give their evidence and be tested by cross-examination, and after hearing the submissions of their counsel to determine where the truth of the matter lies.

[29] The fairest thing this court can do is give to the first respondent the opportunity to meet the allegations against him. Only after hearing all sides can I come to a conclusion whether or not the Applicant's case is made out. To make a definitive ruling now will deprive the court of the opportunity to assess the evidence and determine whether there is need for the invocation of the Court's equitable or other jurisdiction, and if so, what the proper course should be.

[30] In making this ruling I bear in mind the allegation that the first respondent is not only the named executor but the further allegation that by his acts he

became a trustee of the estate. Whether or not he is a *trustee de son tort* or a constructive trustee is a question of evidence which has not yet been tested in this case. Reference must also be made to Sections 2 and 43(c) of the ***Trustee Act*** of the Laws of Barbados.

[31] Section 2 defines trust as "Trust does not include the duties incident to an estate or interest conveyed by way of mortgage but with this exception n the expression "trust" and "trustee" extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative; "trustee" includes however, a personal representative, and "new trustee" includes an additional trustee. Sections 43(1) (2) (3) and (4) states –

> "43. (1) The court may, whenever it is expedient to appoint a new trustee, and it is found inexpedient, difficult or impracticable to do so without the assistance of the court, make an order appointing new trustees either in substitution for or in addition to any existing trustees, or although there is no existing trustee.
>
> (2) In particular and without prejudice to the generality of subsection (1), the court may make an order appointing a new trustee in substitution for a trustee who is convicted of felony, or is a bankrupt, or is a corporation which is in liquidation or has been dissolved, or who for any other reason whatever appears to the court to be undesirable as a trustee.

> (3) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.
>
> (4) Nothing in this section gives power to appoint an executor or administrator."

The term personal representative is used to cover the offices of executor and administrator when the same principles apply to both.

[32] **Williams, Mortimer and Sunnucks** in ***Executors, Administrators and Probate*** at page 17 under 'personal representative' states:

> "This is a collective term used to cover the offices of executor and administrator where the same principles of law apply to both. For the purposes of the Administration of Estates Act 1925 it includes as regards liability for death duties any person who intermeddles with the property of a deceased person. The question when a personal representative becomes a trustee is discussed in relation to assents. The term "legal personal representatives" has been held for the purposes of section 5(2) of the Copyright Act 1911 to include the foreign executors of a foreign testator having personal property in England."

[33] In ***Probate Disputes and Remedies 1st Edn*** by **Dawn Goodman and Brenda Hall** at page 9 under the heading "Dispute about who should be Personal Representative", it is stated:

> "A caveat can be lodged to give a person interested in the estate the opportunity of making representations as to who should take out the grant – A residuary beneficiary

> may have good reason to suppose that an executor named in the will would be unsuitable to take out the grant because of criminal conduct, irresponsibility with money, mental illness, conflict of interest or some other reason. One of a number of people entitled to take out a grant of administration may be unhappy about the grant being taken out by another. In both cases the issue could be argued before a probate Registrar pursuant to a Summons for Directions under the Non Contentious Probate Rules 1987 and a grant prevented in the interim by lodging a caveat."

[34] In ***Letterstedt v. Broers*** **(1884) 9 A.C. 371** it was alleged by the Plaintiff that a trustee Board had ceased to be fit and proper to be entrusted with the administration of the estate of the deceased because of alleged misconduct and abuse of power. The plaintiff asked for the removal of the Board from the office of executor under the will and the appointment of another executor in its place.

[35] **Lord Blackburn** said at page 385 of his judgment:

> "There may be some peculiarity in the Dutch Colonial law, which made it proper to make the prayer in the way in which it was done to remove them from the office of executor; if so, it has not been brought to their Lordships' notice; the whole case has been argued here, and, as far as their Lordships can perceive, in the Court below, as depending on the principles which should guide an English Court of Equity when called upon to remove old trustees and substitute new ones. It is not disputed that there is a jurisdiction "in cases requiring such a remedy," as is said in Story's Equity Jurisprudence, s. 1287, but there is very little to be found to guide us in saying what are the cases requiring such a remedy; so little that their Lordships are compelled to have recourse to general

principles.

Story says, Section 1289, "But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity."

It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.

The reason why there is so little to be found in the books on this subject is probably that suggested by Mr. Davey in his argument. As soon as all questions of character are as far settled as the nature of the case admits, if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the

framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the Court might think it proper to remove him; but cases involving the necessity of deciding this, if they ever arise, do so without getting reported. It is to be lamented that the case was not considered in this light by the parties in the Court below, for, as far as their Lordships can see, the Board would have little or no profit from continuing to be trustees, and as such coming into continual conflict with the appellant and her legal advisers, and would probably have been glad to resign, and get out of an onerous and disagreeable position. But the case was not so treated.

In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case.

It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded.

Looking therefore at the whole circumstances of this very peculiar case, the complete change of position, the unfortunate hostility that has arisen, and the difficult and delicate duties that may yet have to be performed, their Lordships can come to no other conclusion than that it is necessary, for the welfare of the beneficiaries, that the

> Board should no longer be trustees.
> Probably if it had been put in this way below they would have consented. But for the benefit of the trust they should cease to be trustees, whether they consent or not.
>
> Their Lordships think therefore that the portion of the final judgment which is, "That the prayer for removal of the executors be refused," should be reversed, and that in lieu of it the Court below should be directed to remove the Board from the further execution of the trusts created by the will, and to take all necessary and proper proceedings for the appointment of other and proper persons to execute such trusts in future, and to transfer to them the trust property in so far as it remains vested in the Board. The rest of the judgment should stand."

[36] In ***Probate, Disputes and Remedies*** *(op. cit.)* the authors noted that Section 41 of the UK **Trustee Act 1925** (which is in *pari materia* with section 43 of the local ***Trustee Act***) is sufficiently wide to enable the Court to remove personal representatives from office for reasons other than the common causes - residing permanently abroad, being mentally disturbed, becoming bankrupt or being convicted of a serious crime - the Court will not exercise its discretion lightly and would only do so generally:

(a) Where there has been a breach of duty and the court thinks that the estate will not be safe or will not be administered in accordance with the will or the intestacy rules;
(b) When it is in the interests of the beneficiaries that the personal representatives be removed;
(c) When there is considerable friction between the personal representatives.

[37] It is noted that in the majority of cases an application is made under Section 50 of the ***Administration of Justice Act 1985*** rather than under the Section 41 of the **Trustee Act.**

[38] In ***Letterstedt v Broe*****rs** *(Op. Cit).* the headnote reads:

> "There is a jurisdiction in the law of equity to remove old trustees and substitute new ones in cases requiring such a remedy.
>
> "The main principle on which such jurisdiction should be exercised is the welfare of the beneficiaries and of the trust estate".

Further Submissions and Discussion

[39] Mr. Patterson Q.C endorsed Mr. Gale's Q.C submission with respect to the application to remove the executor. He agreed that there was no power given to a court in the Laws of Barbados to remove a named executor.

[40] Both he and Mr. Gale Q.C. submitted further, that there was no power in the Court to appoint an executor. Reliance was placed on Section 43 (4) of the ***Trustee Act*** of the Laws of Barbados and also ***Carvel's case*** **([2007] EWHC 1314 (Ch)**. Mr Patterson further urged that the Court had no power to substitute an executor.

[41] Mr. Phelps argued that there was an inherent jurisdiction in the court to remove a personal representative.

[42] There is merit in the submission of Messrs Gale Q.C and Patterson Q.C that the court has no power to appoint an executor. Section 43 (4) also deprived the courts of that right. An executor is appointed by the will; where therefore, the court made an appointment of any person to administer an estate, it appointed an administrator.

[43] It was further submitted that the court does not have any inherent jurisdiction to appoint or displace personal representatives under a grant of probate or letters of administration which remain in force.

[44] Mr. Patterson Q.C refers to the relief sought under paragraph 9, which is "an order that two other persons namely Suzanne Costello-Haloute and Reginald Austin, beneficiaries under the will of the said deceased be appointed as administrators of the estate of the said deceased together with the respondent and that the decision of the said Executor and Administrator be on the basis of a majority" and made the point that there is undoubtedly power in the court to remove trustees. He made the distinction between trustees and executors and submitted that the executor becomes a trustee only after distribution.

[45] However, the Court has to deal with the case as filed, where it is alleged that the named executor has by his acts become a trustee (either constructive or

de son tort). I have not as yet heard the evidence so as to ascertain if the first respondent is an executor simpliciter or an executor who is also a trustee, however styled. I will not strike out the claim for relief under paragraph 8 on a hypothesis or a mere argument on law until the factual matrix of the case is before me after I have heard the evidence.

[46] It is a bit premature to argue that a person cannot be removed because he is a named executor in the face of allegations that he is also a trustee (either constructive or *de son tort*) without reference to evidence. To attempt to make such a distinction at a preliminary stage is artificial in my view.

[47] In addition, I am of the opinion that to strike out the claimant's application for the relief sought at paragraphs 8 and 9 of the notice of motion would deprive her of the opportunity to amend her pleadings at any stage if she so desired.

DISPOSAL

[48] The court will hear the case before making a definitive ruling on the points that have been made. Accordingly, this Court refuses to grant the relief sought on the application *in limine.*

William J. Chandler
Judge of the High Court.